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No. 495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ANTHONY MUTTER,

Appellant,

vs.

STATE OF WISCONSIN,

Appellee.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellee has moved to dismiss the appeal on the ground that it does not present a substantial federal question. The Appellant files this brief in opposition to such motion to dismiss the appeal.

STATEMENT OF FACTS.

The facts pertinent to this appeal have been stated in Appellant's Jurisdictional Statement, and have been summarized in Appellee's Brief in Support of Motion to Dismiss. Appellee's summary is replete with unwarranted characterizations of the facts. One such characterization requires comment here.

Appellee states that Ch. 227, Wis. Stats., the Wisconsin Administrative Procedure Act, provides an "orderly method" of reviewing attempted withdrawals under the Forest Crop Law. From this unsupported—and unsupportable—assertion, Appellee's Brief implies that Vilas County's failure to seek administrative review should be condemned; and that Appellant's action in removing purported seizure notices, which was taken in the belief that county lands had been validly withdrawn, ought also to be condemned without reference to whether the withdrawal was effective or not.

Such assertions and implications are wholly irrelevant to this appeal. They are not properly included in Appellee's statement of facts and deserve no consideration by the Court.

QUESTIONS PRESENTED

We submit that Appellee's second question prejudicially misstates the issue before the Court on this appeal.

Appellee's second question characterizes the state's action as having amended or altered its own "contract or *working agreement* with Vilas County." There is a profound difference between a contract of the state and a mere "working agreement" with its political subdivision. In upholding the Appellant's conviction, the Wisconsin

Supreme Court found that a statutory contract, not a working agreement, had been altered by subsequent legislation. No doubt Appellee would like to obscure the distinction, thereby hoping to avoid the whole question of the state's violation of the contract clause in the United States Constitution.

Appellee's second question also states that the effect of the subsequent state-enacted statute was "solely to assure reimbursement to the State of funds which originally came from the state treasury." Such a statement seems calculated to inject an equitable consideration into the case which is entirely impertinent to the constitutional question here involved. If equity were to control, it could easily be demonstrated that the counties of Wisconsin, including Vilas County, have yielded up to the state under the Forest Crop Law, in forest mill taxes and severance taxes, far more than they have ever received in state aids. But this is not the concern of the Court on this appeal. The question here must properly be formulated in conformity with the Wisconsin Supreme Court's decision that the effect of the statutory amendments was to deprive the county of a means of withdrawal previously guaranteed to remain an inviolable contract right.

ARGUMENT.

I. APPELLANT MUTTER HAS STANDING TO ASSERT THE UNCONSTITUTIONALITY OF THE STATUTE, WHERE THE INTERPRETATION OF THAT STATUTE PROVIDES THE SOLE SUPPORT FOR HIS CONVICTION.

The Appellee's suggestion that *Hooker* v. *Burr*, 194 U.S. 415, 24 S. Ct. 706, 48 L. Ed. 1046 (1904) controls this case is wholly without merit. *Hooker* held that a purchaser at a foreclosure sale acquired no rights or interest in the contract between mortgagor and mortgagee. Having no rights in that contract, it followed that the purchaser did not suffer any injury, even if the statute in question did impair the obligations of that contract. Following *Tyler* v. *Judges of the Court of Registration*, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252 (1898), the Court held that the purchaser had no standing to assert that the statute impaired the obligation of that contract.

The Appellee appears to be arguing simply that Appellant Mutter has no standing to assert the constitutional rights of Vilas County. It is not clear what significance the Appellee ascribes to the time element here, nor to the gratuitous assertion that Mutter willfully violated Section 26.06(2), Wis. Stats. It is conceded that Mutter willfully removed the purported seizure notices, but to assert that Mutter thereby willfully violated Section 26.06(2) is to assume the very ground in controversy. It was the position of Mutter and his employer that the lands had been validly withdrawn from the Forest Crop Law; therefore, the purported seizure notices had no effect and were in fact an attempt by the State to convert the property of

the County. In no sense did Mutter *willfully* violate Section 26.06(2), Wis. Stats. If Ch. 195, L. 1959, as construed by the Wisconsin Supreme Court, is unconstitutional, Mutter could not have violated Section 26.06(2), willfully or otherwise, since he was not removing seizure notices from lands still entered under the Forest Crop Law.

The rule denying standing to assert the rights of another is only a rule of practice. *Barrows* v. *Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953). The reason for the rule is to protect the efficacy of the adversary system.

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? That is the gist of standing" *Baker* v. *Carr*, 369 U.S. 186, at p. 204, 82 S. Ct. 691, at p. 703, 7 L. Ed. (2d) 663 (1962), Brennan, J."

In *Baker* v. *Carr*, the question was one of the "substantiality" of the injury alleged; in the case at bar, the question is one of "directness." See discussion of standing by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, at p. 154, 71 S. Ct. 624, at p. 639, 95 L. Ed. 817 (1951). Nonetheless, since the validity of Mutter's conviction turns upon whether Chapter 195, L. 1959, as interpreted by the Wisconsin Supreme Court, is constitutional, Mutter clearly has the "personal stake in the outcome" required by *Baker* v. *Carr*.

Since the reason for the rule denying standing is so palpably lacking in this case, Mutter should be held to have standing to assert the constitutional rights of his employer to prevent harm to himself. Dissenting in *Communist*

Party of the U. S. v. Subversive Activities Control Board, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. (2d) 625 (1961), Mr. Justice Douglas pointed out that there is ample precedent for such practice:

> "This analysis has support in a long line of cases where the court has allowed A to assert B's constitutional right in seeking redress or prevention of harm to himself. The root of this doctrine is found in equity." 367 U.S. 1, at p. 186, 81 S. Ct. 1357, at p. 1457.

Mr. Justice Brennan, dissenting for himself and Chief Justice Warren in the same case, added that,

> ". . . a party has been allowed to assert the constitutional rights of another person not before the court as a named party in a variety of situations where the effect of the challenged state action on himself is derivative from the impact on the other person." 367 U.S. 1, at p. 193, 81 S. Ct. 1357, at p. 1461.

Surely the effect of Ch. 195, L. 1959, upon Mutter is derivative from its impact upon his employer. Mr. Justice Frankfurter, speaking for the majority in the same case, did not hold that the party could not raise the constitutional rights of its members, but only that it was premature for it to do so before the Act was in force.

The cases referred to by Mr. Justice Douglas begin with *Truax* v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915), in which it was held that an alien employee threatened with loss of employment because of a State statute restricting the proportion of aliens which could be employed had standing to challenge the law, although the constitutional rights abridged were those of his employer. In *Buchanan* v. *Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917), a white seller of real property was allowed to assert the rights of a Negro purchaser in enforcing a contract to sell against a racial restrictive city ordinance.

In *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), a private and a parochial school were allowed to sue to enjoin enforcement of a state statute requiring virtually all parents to send their children to public schools on the ground that it violated the constitutional rights of parents and guardians. *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U.S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1944), held that a corporation could assert the due process rights of shareholders who were not Wisconsin residents in challenging a Wisconsin statute requiring the corporation to deduct a privilege tax from all dividends it paid. The corporation would remain liable to its stockholders if the tax were unlawfully withheld. It was enough for the Court that

> ". . . they are . . . adversely affected by obedience to the statute, if it is unconstitutional. We therefore conclude that appellants have standing to challenge the constitutionality of the statute." 322 U.S. 435, at p. 440, 64 S. Ct. 1060, at p. 1063.

In *Barrows* v. *Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), the defendant was sued for damages for breach of a racial restrictive covenant. *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), had previously held that equitable enforcement of such covenants was state action denying equal protection of the laws to Negroes. *Barrows* v. *Jackson* held that the defendant co-covenantor had standing to assert the constitutional rights of potential non-white purchasers of her property in order to defeat the action.

> "It sufficiently appears that mulcting in damages of respondent will be solely for the purpose of giving vitality to the restrictive covenant . . . . This court will not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this court would deny Cali-

fornia the right to enforce in equity, *Shelley, supra;* or that this Court would deny California the right to incorporate in a statute, *Buchanan* v. *Warley,* 245 U.S. 60, 38 S. Ct. 16 . . . ." 346 U.S. 249, at p. 258, 73 S. Ct. 1031, at p. 1036.

It is submitted that the criminal conviction of Mutter is "solely for the purpose of giving vitality" to Ch. 195, L. 1959. If Ch. 195, L. 1959 is unconstitutional, Mutter's conduct was circumspect in every respect. There was no use of force here, no breach of peace. In fact, Mutter was only acting to protect property of his employer, on the land of his employer, from conversion by the State.

The reasoning of the court in *Barrows* v. *Jackson* suggests that conviction of Mutter "for the purpose of giving vitality" to an unconstitutional statute would be state action to deprive Mutter of property without due process of law. There would be no purpose in requiring Mutter to state his grievance in such a circuitous manner, simply to overcome a rule of practice, but this alternative analysis emphasizes the point that the reason for the rule denying standing does not exist here.

II. AMENDMENTS TO THE WISCONSIN STATUTES HAVE BEEN CONSTRUED TO IMPAIR THE OBLIGATIONS OF A CONTRACT EXISTING BETWEEN THE STATE AND VILAS COUNTY, WITH INJURIOUS CONSEQENCES TO APPELLANT.

a. It is immaterial in this case, whether the obligations of a contract between the county and a private party were impaired.

There is no question that timber sale agreements between Vilas County and private citizens have been nullified by the decision of the Wisconsin Supreme Court upholding the validity of the 1959 amendment to the Forest Crop

Law. But this is immaterial here, for we are concerned with the impairment of an express statutory contract between the county and the state itself.

b. None of the cases cited by Appellee, and no case heretofore decided by this Court, has ever held that a state is free to abrogate an express statutory contract it has made with one of its subdivisions.

Two types of cases have been cited by appellee in which state legislative power has been held limited by Article I, Section 10 of the United States Constitution. In one type, subsequent legislation would have abrogated rights vested in private citizens under contracts with the state's political subdivision. In the other type, the legislation would have abrogated rights vested in private citizens under contracts with the state itself. Admittedly, the instant case does not fall within either of these classes.

But neither does the instant case fall within the class of cases which Appellee claims are controlling here. *For not a single one of such cases involved the abrogation of the rights of a political subdivision under an express statutory contract between such political subdivision and the state itself.*

Hunter v. *Pittsburgh*, 207 U.S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907), as noted by Justice Frankfurter in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 Sup. Ct. 125, 5 L. Ed. (2d) 110 (1960), found that there was no contract between the state and the municipality. *Trenton* v. *New Jersey*, 262 U.S. 182, 43 Sup. Ct. 534, 67 L. Ed. 937 (1923), merely held that a governmental power originally conferred upon a municipality by a state statute may be revoked by subsequent legislation; again, no contract between the municipality and the state was involved. *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 53 Sup. Ct. 431, 77 L. Ed.

1015 (1933), did not even involve a claim that the contract clause of the U. S. Constitution had been violated. And *Worcester* v. *Worcester Consolidated Street Railway Co.*, 196 U.S. 539, 25 Sup. Ct. 327, 49 L.Ed. 591 (1905), far from stating, as Appellee contends, that the contract clause may never be invoked by a municipality, merely said that a municipality could not object to legislative abrogation of a contract between it and a third party, where such third party had already assented to the contract's impairment.

There are three fundamental factors which distinguish the instant case from any case heretofore decided by this Court. They are:

1. The statute (sec. 77.03, Wis. Stats.) expressly stated that the provisions of the Forest Crop Law constituted the terms of a contract *between the county and the state itself*, and expressly guaranteed that such contract should remain inviolable by subsequent legislation. The Wisconsin Supreme Court has acknowledged the existence of such a statutory contract in its decision.

2. The *county's* consent was expressly required by the statute as a condition precedent to the validity of any subsequent legislation which would have the effect of varying the terms of such statutory contract, and the county gave no such consent.

3. The decision of the Wisconsin Supreme Court, that the 1947 and 1959 amendments to the Forest Crop Law validly deprived the county of previously-existing contract rights to withdraw its forest lands, has provided the sole basis upon which Appellant's actions, as a private citizen, could be held a violation of law.

As Appellant's Jurisdictional Statement and Appellee's Brief in Support of Motion to Dismiss have both pointed out, this Court has ruled that: (1) a private citizen's or

public official's rights under a statutory contract with the state or one of its political subdivisions may not be constitutionally impaired by subsequent legislation; (2) a political subdivision of a state enjoys no contract rights against the state itself under a mere grant of governmental power by statute, and the state's revocation of such grant of governmental power is therefore not prohibited by the contract clause, unless the contract rights of private citizens are thereby impaired; and (3) a political subdivision cannot be heard to complain that subsequent legislation has impaired its rights under a contract with a third person (not the state), although the rights of such third person under such a contract are constitutionally protected.

Two basic principles are inherent in these rules. The first is that a state, though it may constitutionally revoke privileges or governmental powers granted by statute, may not use its legislative power to revoke *contract* rights granted by statute. The second is that the United States Constitution protects private citizens against injury resulting from legislation impairing contract obligations. We submit that these principles are applicable to the instant case; for the state, as the Wisconsin Supreme Court has found, entered into an express statutory contract with the county, and then attempted by subsequent legislation unilaterally to abrogate or alter the terms of such contract. And the determination that this legislation was valid is the sole support for Appellant's conviction.

Whether a state may thus abrogate its own contract with one of its political subdivisions to the consequent injury of one of its citizens (even though the rights of such citizen which are affected are not contract rights) is the question presented on this appeal. It is a question never before presented to or decided by this Court; the precise question has only been bracketed by earlier decisions in the area,

as Appellee's own Brief indicates. It is important for this Court to decide whether such state action is permissible or falls within the area of constitutional prohibition.

While, as noted in our Jurisdictional Statement, we have found no case which has ever decided the precise issue presented by this appeal, we have found one decision which holds squarely for the principle that a municipality's rights under a contract with the state itself are constitutionally protected. *Grogan* v. *San Francisco*, 18 Cal. 590 (1861). So far as we have been able to determine this is the only reported case, other than the case at bar, in which a court of this land has first found that a statute constituted a contract between a state and a municipality, and then went on to decide whether such contract was inviolable against subsequent legislation. After finding that a state legislative grant to San Francisco was an executed contract within the contract clause, the California court considered the effect of the state's sovereign power as follows (18 Cal. 613):

> "And though a municipal corporation is the creature of the Legislature, yet when the State enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the Legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts."

We submit that the reasoning of the California court is impeccable; that it is firmly grounded upon the principles evolved in the decisions of this Court; and that it should be given controlling effect in the case at bar.

CONCLUSION.

Because this appeal presents a question of public importance respecting the constitutional limits of state legislative power, where the exercise of such power has abrogated the state's own contract obligations with injurious consequences to one of its citizens, and because this question has never been decided by this Court, we submit that jurisdiction should be noted.

Respectfully submitted,

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October 23, 1964.